STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 15, 2007
v	No. 265917 Kent Circuit Court
MARK TYSON COTTLE, Defendant-Appellant.	LC No. 04-009407-FH

Before: Fort Hood, P.J., and White and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree home invasion, MCL 750.110a(3), and sentenced to twelve months in jail. He appeals his conviction as of right. We affirm.

On August 15, 2004, Ketty Garcia arrived home and discovered that someone had been in her second-floor bedroom. Her clean, folded laundry was scattered across her upstairs bedroom, as if someone was looking for something. The window, which had been closed, was wide open. Her son's Playstation console, which should have been connected to the television in her bedroom, was not there. She found a Playstation at the bottom of the stairs, but it did not belong to her son. Her son's Playstation was in new condition, but the one found by the stairs was scratched, the joysticks were worn, and it did not work. She immediately suspected that defendant, a neighbor and former friend, broke into the house while she and her family were gone to find his white t-shirt that she had refused to return to him earlier that day.

At trial, Garcia and her mother, Myrna Maldonado, with whom Garcia lived, testified that they both spoke with their neighbor, Janice Mazique, and her daughter Pamela Spencer, who was visiting that day, about the incident. Spencer told Garcia that she watched defendant take the Playstation out of the house and later spoke with him about it. Maldonado also testified that Spencer and Mazique told her that they had seen defendant entering the house. Defendant did not object to that testimony.

Garcia, Maldonado, and Roberto Gonzalez, Maldonado's boyfriend who also lived at the home on Visser Place, all testified that defendant called the house that night. Gonzales stated that he spoke with defendant on the phone while the police were still on the front porch. Defendant apologized to him for coming into the house and explained that he had not been thinking clearly and only wanted to retrieve his shirt. Maldonado testified that defendant called

the house before police arrived and after they left, but she refused to speak with him when he called the second time and gave the phone to Gonzalez. She claimed that during both calls, defendant admitted that he took the Playstation. She stated that when defendant called the next day, he denied taking the Playstation, but apologized for entering her home, asked her to forgive him and asked her not to press charges, because he knew what he did was wrong.

Spencer and Mazique testified at trial. However, they both claimed they could not remember the events of that day. Spencer claimed she simply did not remember the events, although her alcohol consumption that day may have played a role in her memory loss. Mazique explained that in July 2003, she suffered a stroke, and had memory problems ever since.

Spencer's preliminary examination testimony transcript was read into evidence over the objection of defendant that it violated his Confrontation Clause rights. Mazique's and Spencer's statements to police officers and the officer's police report were also admitted into evidence over the objection of defendant that Mazique's statements to police were not only inadmissible hearsay, but their admission violated his Confrontation Clause rights. The trial court held that the evidence was admissible under hearsay exceptions, and did not violate defendant's Confrontation Clause rights because both were available for cross-examination at trial.

Spencer testified at the preliminary examination that she believed defendant climbed up a fence and an electric pole to enter the home through the second-floor bedroom window, and that she then watched him leave the Maldonado front porch a few minutes later, carrying a black box she believed to be a Playstation console. She saw defendant carrying a Playstation back to the home fifteen minutes later and, according to her statement to police, overheard him say "I'm going to take this back." He left empty-handed. He returned to the home, disappeared from the porch, and left again a few minutes later carrying a white t-shirt.

Mazique told police that she watched defendant climb the fence, jump up, and grab the upstairs bedroom window of Maldonado's home. She later saw defendant leave the house by the front door, carrying a Playstation console. She too watched defendant return a Playstation to the house, and leave with nothing. She saw defendant enter the house a third time and leave with a white t-shirt. On cross-examination, Mazique explained that she remembered defendant climbed up the fence and pole to enter the bedroom window once before, when Garcia's son was locked out of the house, but everything about that and August 15, 2004, was "kind of blurry."

Defendant argues that the admission of Spencer's preliminary examination testimony violated his Confrontation Clause rights because he did not have an adequate opportunity to cross-examine Spencer about evidence revealed after the preliminary examination. He could not cross-examine Spencer at the preliminary examination about the "new" evidence, and he could not cross-examine her at trial about it because she could not remember the incident. As an initial matter, we note that defendant did not object to the testimony by Garcia wherein she delineated the statements made by Spencer and Mazique that identified defendant as the individual who entered the home through the window and exited with the Playstation. The admission of cumulative evidence is not prejudicial. *People v Rodriquez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996). Moreover, although defendant blanketly asserts that he was deprived of the opportunity to question Spencer about "new" evidence at trial, he failed to make an offer of proof on the record regarding the questions that he was unable to ask this witness.

MRE 103(a)(2). Aside from these issues, we nonetheless conclude that defendant was not deprived of his right of confrontation.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Washington*, 468 Mich 667, 670; 664 NW2d 203 (2003). We review questions of law de novo, *id.* at 270-271, as well as constitutional questions, *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000).

The Sixth Amendment guarantees a defendant in a criminal prosecution the "right. . . . to be confronted with the witnesses against him." US Const, Am VI. The United States Supreme Court held that evidence of "testimonial" statements by a witness who is unavailable to be cross-examined are not admissible at trial unless the defendant had a prior opportunity to cross-examine the witness. *Crawford v Washington*, 541 US 36, 59; 124 S Ct 1354; 158 L Ed 2d 177 (2004). That is true even if the statement is otherwise admissible under a hearsay exception. *Id*. at 61. Testimony given at a preliminary hearing is testimonial. *Id*. at 68. The Supreme Court also recognized that as long as there is "adequate" opportunity to cross-examine a witness at a preliminary examination—the scope and nature of the cross-examination is not significantly limited—that satisfied the requirements of the Confrontation Clause if the witness was unavailable to testify at trial. *Id*. at 57; *California v Green*, 399 US 149, 165; 90 S Ct 1930; 26 L Ed 2d 489 (1970). "[T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v Fensterer*, 474 US 15, 20; 106 S Ct 292; 88 L Ed 2d 15 (1985). Moreover, the Confrontation Clause guarantee is implicated only when the witness is not available to be cross-examined at trial. *Crawford*, *supra* at 59; *People v Katt*, 468 Mich 272, 292 n 12; 662 NW2d 12 (2003).

Defendant had an adequate opportunity to cross-examine Spencer at the preliminary hearing and did so. He elicited testimony that Spencer could not see the front door from where she was sitting and that she had been drinking vodka and beer most of the afternoon. He also forced Spencer to admit that defendant could have been returning the Playstation to the Maldonado home, and that "she could have been wrong" when she accused defendant of taking the Playstation from the Maldonado residence.

Moreover, Spencer was available for cross-examination at trial, and defendant cross-examined her. Defendant notes that he was unable to cross-examine Spencer about everything he wished. Defendant is entitled to an adequate opportunity to cross-examine the witness, however, not an unlimited cross-examination. *Fensterer*, *supra* at 20. Although a finding that Spencer was both available for cross-examination, yet not available to testify, seems inconsistent, there is no requirement that the two characterizations be identical because they are made for different purposes. *United States v Owens*, 484 US 554, 563-564; 108 S Ct 838; 98 L Ed 2d 951 (1988). Therefore, defendant's Confrontation Clause rights were not violated and the trial court did not abuse its discretion by admitting the preliminary examination testimony of Spencer.[1]

[1] We also note that, at sentencing, the trial court stated that it was "obvious" that the witnesses
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Defendant next argues that admission of the police report into evidence when Mazique could not remember the events of August 15, 2004, violated his right to confront the witness. Defendant is correct that the United States Supreme Court established a per se rule forbidding the admission of testimonial, out-of-court statements unless the defendant had the opportunity to cross-examine the witness in *Crawford*. Nevertheless, the admission into evidence of her statements to police did not violate the Confrontation Clause.

As discussed previously, a defendant is guaranteed the right to confront the witnesses against him, and evidence of "testimonial" statements by a witness who is unavailable to be cross-examined are not admissible unless the defendant had a prior opportunity to cross-examine the witness. *Crawford, supra* at 59. Statements made to police in the course of an interrogation are testimonial. *Id*. at 52. Statements made to police officers are "testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v Washington,* ___ US ___; 126 S Ct 2266, 2273-2274; 165 L Ed 2d 224 (2006). Statements made to police that deliberately recount past events, after the events described are over, are testimonial. *Id*. at 2278.

In this case, it is clear that Mazique's made statements to police in the course of the investigation, and those statements were intended to establish events potentially relevant to defendant's criminal prosecution. She spoke with police after the crime was complete and recounted the events of the afternoon. Thus, as defendant argues, the statements were clearly testimonial.

The Supreme Court recognized, however, that the Confrontation Clause guarantee is only implicated when the witness is not available to be cross-examined at trial. *Crawford, supra* at 59; *Katt, supra* at 292 n 12. Mazique was available for cross-examination at trial, and defendant did, in fact, cross-examine her regarding her statements to the police.

Defendant contends that because Mazique cannot remember her statements to police, his cross-examination was "frustrated" and his right to confront the witness against him was violated. The United States Supreme Court acknowledged that a witness' memory loss might implicate the Sixth Amendment right to confront witnesses. *Green, supra* at 168-169. The Court, revisiting the issue in *Owens, supra* at 554, noted that the Confrontation Clause does not

> guarantee every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for

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had not forgotten the prior testimony or the events in question. Rather, the trial court concluded that the witnesses were "frighten[ed] … into silence," and the jury reached the same conclusion based on the discussion of the case that occurred after the verdict was rendered. Confrontation claims will be extinguished on equitable grounds because of the rule of forfeiture by wrongdoing. *Crawford, supra* at 62.

giving scant weight to the witness' testimony. [*Id*. at 558, quoting *Fensterer, supra* at 21-22.]

In *Owen*, the witness identified the defendant as his assailant from a photo line-up before trial, but was unable to identify the defendant as the assailant at trial because he suffered memory loss from the attack. *Owen, supra* at 556. The Supreme Court held that the admission into evidence of his earlier identification did not violate the defendant's Confrontation Clause rights because despite the witness' memory loss, the defendant had the opportunity to cross-examine the witness at trial and expose the deficiencies of both his memory and his prior testimony. *Id.* at 559-560. The ability and opportunity "to impugn the witness' statement when memory loss is asserted" was a realistic weapon, and all that the Confrontation Clause required. *Id*. at 560.

It is clear that defendant had a full and fair opportunity to expose the infirmities of Mazique's testimony. Mazique openly admitted on cross-examination that she could not remember anything without writing it down, and that everything that happened on August 15, was "fuzzy." Further, she stated that her memory difficulties were caused by a stroke that occurred many months before August 15, 2004; thus, her memory was impaired even at the time she spoke to police. Defendant certainly had the opportunity to impugn the accuracy of her statements to the officers and her trial testimony. In fact, in addition to generally casting doubt on her memory of the events, defendant was able to show she could have confused defendant's previous entry into the bedroom window with the events of August 15. Defendant may not have been able to cross-examine Mazique in whatever way he wished, but he did, in fact, have the opportunity to effectively test her recollection of events. The Constitution does not guarantee a successful cross-examination, only an adequate opportunity to do so. *Owens, supra* at 560. Therefore, defendant's Confrontation Clause rights were not violated.[2]

Affirmed.

/s/ Karen M. Fort Hood
/s/ Helene N. White
/s/ Stephen L. Borrello

[2] Furthermore, in *People v McDaniel*, 469 Mich 409, 413; 670 NW2d 659 (2003), the Supreme court held that "MRE 803(8) allows [for] admission of routine police reports, even though they are hearsay, if those reports are made in a setting that is not adversarial to the defendant."